

## APPELLATE CIVIL.

Before Chatterjea and Cuming JJ.

KENARAM PAL

v.

KINU MANDAL\*

1923

Jan. 25.

*Occupancy Holding—Non-transferable occupancy holding—Liability to sale—Execution proceedings by ordinary creditor.*

A non-transferable occupancy holding is liable to be sold at an execution sale at the instance of an ordinary creditor notwithstanding objections made by the riyat.

*Chandra Benode Kundu v. Ala Bux Dewan* (1) followed.

SECOND APPEAL by Kenaram Pal, the decree-holder.

The facts of the case out of which this appeal arises appear in the judgment of Mr. M. Smither, the District Judge, passed on appeal :—

“The plaintiff in this case holds a money-decree against the defendant and is not landlord of the defendant. The plaintiff took out execution of the decree and sought to put up to sale a holding of the defendant. The defendant appeared and contended that the holding was a non-transferable occupancy holding and that the decree-holder could not put it up to sale in execution of his money-decree. The lower Court without going into the question of fact whether the holding was a non-transferable occupancy holding, rejected the judgment-debtors’ objection on the ground that the Full Bench decision in *Dayamayi*

\*Appeal from Order, No. 233 of 1921, against the order of M. Smither, District Judge of 24-Parganahs, dated July 2, 1921, reversing the decree of Khitish Chandra Chatterjee, Munsif of Baraset, dated April 15, 1921.

“v. *Ananda Mohan Roy Chowdhury* (1) disposes of  
 “the contention that a non-transferable occupancy  
 “holding cannot be sold in execution of a money-  
 “decree. This appears to be the meaning of the judg-  
 “ment of the lower Court. . . . There are  
 “passages in the judgment of the Special Bench in  
 “*Chandra Benode Kundu v. Ala Bux Dewan* (2)  
 “which show that the Special Bench was of opinion  
 “that the holder of a money-decree not being a landlord  
 “can sell up a non-transferable occupancy holding.  
 “On the other hand, that was not the issue brought  
 “before and decided by that Court; . . . at the  
 “end of the judgment the particular point for decision  
 “and decided, is again stated in the following passage:—  
 “We hold accordingly that the question before the  
 “Special Bench should be answered in the affirmative  
 “and that the sole landlord of a *raiyat* is competent  
 “to sell, in execution of a money-decree against the  
 “*raiyat*, his occupancy holding, whether the holding  
 “be or be not transferable by custom or local usage’.  
 “. . . . The question in the present case is  
 “not whether a sole landlord is competent to sell a  
 “non-transferable occupancy holding in execution of  
 “his money decree, but whether a person, who is not a  
 “landlord at all, is competent to do so. It seems  
 “clear on a perusal of that judgment that had the  
 “issue now before this Court been then before the  
 “Special Bench (2) it would have been decided in  
 “favour of the holder of the money decree. In  
 “particular, on its way to decide the matter before  
 “it, the Special Bench (2) held that the decision in  
 “*Bhiram Ali Shaik v. Gopi Kanth Shaha* (3) was  
 “a wrong decision. The question for me to decide  
 “now is whether a District Court must follow the

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(3) (1897) I. L. R. 24 Calc. 355.

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“decision in *Bhiram Ali Shaik v. Gopi Kanth Shaha*  
 “(1), on the particular issue it decides, until there is an  
 “opposite decision of that very issue, or should itself  
 “decide that issue in the opposite direction, on the  
 “strength of the *obiter* conclusions in the Special  
 “Bench case (1). I take it that a decision, by this  
 “court, on the point in issue following the decision  
 “given on that point in *Bhiram Ali Shaik v. Gopi*  
 “*Kanth Shaha* (1) will probably be reversed having  
 “regard to the Special Bench judgment. In that case  
 “there will come into existence a decision on this  
 “particular issue, which decision will supersede the  
 “authority of *Bhiram Ali's case* (1). But I take it  
 “that I am bound at present by that decision. I allow  
 “this appeal. I set aside the order of the Lower  
 “Court, and remand the case. Evidence will be taken  
 “as to whether the holding is non-transferable, and if  
 “it be found to be non-transferable, the execution  
 “proceeding will be dismissed”. The decree-holder,  
 who had been successful in the Court of first instance,  
 thereupon preferred this appeal from appellate order  
 to the High Court.

*Babu Prabodh Chandra Chatterjee*, for the appell-  
 ant. The point in controversy has been concluded by  
 the decision of the Special Bench of this Hon'ble  
 Court in *Chandra Benode Kundu v. Ala Bux Dewan*  
 (2). The learned District Judge has erred in law in  
 relying on the ruling reported in *Bhiram Ali Shaik*  
*v. Gopi Kanth Shaha* (1) which was clearly overruled  
 in most unambiguous terms by the Special Bench (1).  
 The Judges constituting that Special Bench held that  
 in order to decide the case before them, it was abso-  
 lutely necessary to decide the correctness or otherwise  
 of the ruling reported in *Bhiram Ali Shaik v. Gopi*

*Kanth Shaha* (1). So the view of the learned District Judge that the observations of the Special Bench case with reference to this particular point were *obiter*, is erroneous. From a consideration of the Full Bench decision in *Dayamayi v. Ananda Mohun Roy Chowdhury* (2) and of the Special Bench decision in *Chandra Benode Kundu v. Ala Bux Dewan* (3) it would appear that the Court wanted to and did decide finally all questions as to the transferability of occupancy holdings.

*Babu Amulya Chandra Chatterjee*, for the respondent. The question, viz., whether an occupancy holding can be sold in execution of a decree for money obtained by a person other than the landlord did not arise in the Special Bench case: *Chandra Benode Kundu v. Ala Bux Dewan* (3). Any expression of opinion, therefore, which went beyond the particular question referred, however valuable, cannot be regarded as binding. [*Quilter v. Heatly* (4).] Beginning with construction No. 890, dated 11th July 1834, in the case of *Neolkanth Roy v. Casheenath Ghose*, in which the Court's opinion was given in the affirmative, as to the question of liability of the *jote jama* of a *raiyat* to be sold in execution of a money decree, *provided the zemindar did not object to the measure*, and the Regulations and subsequent cases elaborately discussed in the judgment of the learned Chief Justice in *Chandra Binode's case* (3), there is this common feature in all, viz., that the zemindar or landlord was concerned in each one of the cases. With great respect to the learned Judges a deduction of the broad principle involving involuntary alienations at the instance of strangers, *i.e.*, persons other than the landlord,

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(2) (1914) I. L. R. 42 Calc. 172; (4) (1883) 23 Ch. D. 42, 47.

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from the facts of those cases was not justified or necessary for the purpose of that Special Bench reference (1). And the principle enunciated therein so far as they affected the cases of sales of non-transferable occupancy holdings in execution of a money decree at the instance of the decree-holder other than the landlord, is *obiter*. Again, even assuming that voluntary transfer and involuntary alienation stand on the same footing, when no saleable interest passes by voluntary alienation of a non-transferable occupancy holding unless the landlord is a consenting party, no saleable interest also passes in the case of an involuntary alienation when the landlord is not a consenting party [*Wood v. Wood* (2)], for nothing could be seized that could not be sold. Voluntary alienations of a non-transferable occupancy holding are made and recognised, as there is an implied warranty that the seller who is the *raiyat*, undertakes to see that the sale is approved or consented to by the landlord, otherwise the purchaser gets nothing. There is no such implied warranty in an involuntary alienation, and no Court ought to countenance the sale of an interest contingent in its nature depending on the mere possibility of the landlord recognising the auction-purchaser as his *raiyat* in place of the original one: *Kailash Chandra Pal v. Harimohun Das* (3) and *Samiruddin Munshi v. Benga Sheik* (4). This is also objectionable on the ground of equity and good conscience. While the decree-holder gets something on the one hand by the execution sale of such a holding, on the other hand, the unwary auction-purchaser gets nothing by the purchase, nor, again, is the *raiyat* relieved of the obligation to pay rent to the landlord unless it is determined in one or other of the ways provided by

(1) (1920) I. L. R. 48 Calc. 184.

(3) (1909) 10 C. L. J. 110.

(2) (1843) 4 Q. B. 397.

(4) (1909) 13 C. W. N. 630.

law. Then, again, the landlord can resume the land. Thus both the auction-purchaser and the *raiyat* suffer, while the relief derived by the decree-holder is of a doubtful nature. Though the learned Chief Justice justly observed in enunciating the principle with reference to sales at the instance of a sole landlord in *Chandra Benode's case* (1) that judgment-debtors would no longer be able to escape payment of their just liabilities, this aspect of the case and the hardships and inequities attendant on sales at the instance of a decree-holder other than the landlord were not presented to his Lordship.

Again, as Richardson J. has observed, the status of an occupancy *raiyat* is a creation of Statute. He has got all those rights only which are given by that Statute. It nowhere appears in the Bengal Tenancy Act that the holding of an occupancy *raiyat* is transferable by nature. The fact is that the Bengal Tenancy Act recognises all those other rights which a *jote jamadar* possessed when he became an occupancy *raiyat* by virtue of the Bengal Tenancy Act. Thus, the occupancy right of a *jote jamadar* is not saleable or transferable if, independently of his becoming an occupancy *raiyat* he had no such right. The law only recognises voluntary sales of non-transferable occupancy holdings, as between the *raiyat* and the purchaser, and extends it to others, but not so as to affect the rights of the landlord. The Bengal Tenancy Act does not create a new right, viz., the right of transfer or sale for the *raiyat* where there was none previously. Thus the Court ought not to hold that an occupancy holding can be sold in execution of a money decree at the instance of a stranger, viz., a person other than the landlord, when the holding was not otherwise transferable or saleable.

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The present question should be referred to a Special Bench where it should be argued in detail without any reference to the Special Bench decision in *Chandra Benode's case* (1).

*Babu Prabodh Chandra Chatterjee*, in reply.

CHATTERJEA J. This appeal arises out of proceedings in execution of a decree for money.

The appellant in execution of a decree for money sought to put up to sale a non-transferable occupancy holding of the defendant. The defendant thereupon appeared and contended that the holding being a non-transferable occupancy holding could not be put up to sale in execution of a money-decree.

The Court of first instance relying upon the Special Bench decision in the case of *Chandra Benode Kundu v. Ala Bux Dewan* (1) held that it was saleable. On appeal, the learned District Judge was of opinion that he should follow the decision in the case of *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* (2) until it was overruled by this Court, and that the question whether an ordinary execution creditor can put up a non-transferable occupancy holding to sale in spite of the objections of the *raiyat* was not referred to nor considered by the Special Bench.

No doubt, the question which was referred to the Full Bench was—"Is the sole landlord of a *raiyat* competent to sell, in execution of a money-decree against the *raiyat*, his occupancy holding, unless the holding is transferable by usage or custom?" In order to decide that question however it was necessary to consider the correctness of the decision in *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* (2) as regards voluntary alienations of non-transferable occupancy holdings. It was also necessary to consider the

(1) (1920) I. L. R. 48 Calc. 184. (2) (1897) I. L. R. 24 Calc. 355.

correctness of the decision of the Full Bench in the case of *Dayamayi v. Ananda Mohan Roy Chowdhury* (1) in so far as it adopted the rule laid down in *Bhiram Ali's case* (2), as developed in the later cases, and that was the reason why the Special Bench was constituted. The Special Bench came to the conclusion that the case of *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* (2) was erroneously decided, and that the decision of the Full Bench in *Dayamayi v. Ananda Mohan Roy Chowdhury* (1) required partial modification, namely, that the following should be substituted for the first proposition enunciated therein regarding the transfer for value of occupancy holdings apart from custom or local usage: "The transfer of the whole or a part is operative as against the *raiyat* whether it is made voluntarily or involuntarily."

Now, the Full Bench in the case of *Dayamayi v. Ananda Mohan Roy Chowdhury* (1) laid down the proposition that the transfer of the whole or a part is operative against the *raiyat*—

(a) where it is made voluntarily;

(b) where it is made involuntarily and the *raiyat* with knowledge fails or omits to have the sale set aside.

The result of the modification by the Special Bench was stated to be as follows: "When voluntary and involuntary transfers are placed in the same category so far as the *raiyat* is concerned no difficulty can arise under section 60 of the Civil Procedure Code which makes saleable in execution all property belonging to the judgment-debtor over which he has a disposing power, thus prescribing precisely the same test as was formulated by Mr. Justice Jackson in *Dwarka Nath Misser v. Hurrish Chunder* (3),

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(3) (1879) I. L. R. 4 Calc. 925.



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“namely, that the measure of liability to involuntary  
“alienation is the power of voluntary alienation.”

The learned District Judge has followed the decision of the Division Bench in *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* (1). But as stated above the Special Bench held that it was erroneously decided, and that voluntary and involuntary transfers stand on the same footing so far as the *raiyat* is concerned.

Although therefore the question whether a non-transferable occupancy holding is liable to be sold at an execution sale (notwithstanding objections made by the *raiyat*) at the instance of an ordinary creditor was not specifically referred to the Special Bench, the principle upon which the question is to be decided, had to be considered and was settled by the Special Bench.

I am accordingly of opinion that the order of the lower Appellate Court should be set aside and that of the Court of first instance restored.

There will, however, be no order as to costs of this Court or of the lower Appellate Court.

CUMING J. I agree with the decision of my learned brother with a certain amount of hesitation. I am somewhat doubtful whether the Special Bench case in *Chandra Benode Kundu v. Ala Bux Dewan* (2) can be held to have decided anything more than the point which was actually referred to it for decision, namely, “is the sole landlord of a *raiyat* competent to sell, in “execution of a money-decree against the *raiyat*, his “occupancy holding unless the holding is transferable “by usage or custom?”

The learned Chief Justice in delivering the judgment of the Court at page 223 remarked :

(1) (1897) I. L. R. 24 Calc. 355.

(2) (1920) I. L. R. 48 Calc. 184.

“In these circumstances, this Special Bench has  
 “been constituted to consider the question referred to,  
 “so that we may be free in accordance with the rules  
 “of the Court to examine the correctness of the Full  
 “Bench decision in *Dayamayi v. Ananda Mohun Roy*  
 “*Chowdhury* (1), in so far as it affects the present  
 “matter.” I think it must be presumed that the Special  
 Bench looked at all the authorities and arguments  
 urged before it from the point of view of the parti-  
 cular case, viz., the case of the sole landlord. In the  
 concluding words of the judgment, the learned Chief  
 Justice states: “We hold accordingly that the ques-  
 “tion before the Special Bench should be answered in  
 “the affirmative and that the sole-landlord of a *raiyat*  
 “is competent to sell in execution of a money-decree  
 “against the *raiyat* his occupancy holding whether the  
 “holding be or be not transferable by custom or local  
 “usage,” and possibly in that view of what the  
 Special Bench decided, the judgment of the learned  
 District Judge is correct.

As, however, the view which has been taken by  
 my learned brother coincides with the view which I  
 have always held myself as to the transferability of  
 holdings, I do not propose to differ from the judgment  
 which has just been delivered by him. I therefore  
 agree with him in decreeing the appeal.

*Appeal allowed.*

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(1)(1914) I. L. R. 42 Cal. 172 ; 24 C. W. N. 818.

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